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ABSTRACT

Preventive law is needed to limit the role of the courts in public policy-making, for several reasons. The judiciary usually lacks expertise in a particular policy area, litigation is expensive and time-consuming, judicial solutions are usually too simple, and attorneys representing public agencies in the future will probably be of lower quality, since government offers lower pay than business and fewer psychic rewards than public interest law. Hence preventive law will be an important tool in helping to keep public agencies out of court. Attorneys will probably resist preventive law because it goes against their economic interests and denies them the "valiant" combat of the courtroom. Judges could help by making their opinions clearer to nonlawyers, but that is unlikely. Policy makers need to know the likely constitutionality of their legislation, so preventive law should help them. Academics need to teach preventive law in law schools so that attorneys will know how to help in policy-making. Interest in preventive law is growing, and in the future legal education for public officials should be instituted, especially in constitutional law and statutory rights. Also, attorneys for public agencies should try to be teachers to their agencies. (RW)

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SOME THOUGHTS ON THE PRACTICE OF PREVENTIVE LAW IN THE PUBLIC SECTOR

by Patricia Lines

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6/1/82

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Is the Constitution Too Important to Be Trusted to Lawyers and Judges?

These days much of what goes under the general title of public policy making involves constitutionally sensitive decisions. The public sector - especially the business of public schools - has been fully "judicialized," so that one wonders whether judges should not be schooled in substantive matters relating to education, as well as urban planning, welfare, penology, and the like.

Unfortunately, the realities of overcrowded dockets and a need to pay attention to a wide range of matters, from academic freedom to zoning, make this unlikely. Not too many judges or lawyers have time to examine carefully what makes for good public policy. There is hope, on the other hand, that policy makers can and will learn more about the legal restraints under which they must operate -- that is, hope that policy makers will practice preventive law and in so doing, limit the role of attorneys and judges in policy-making.

If policy makers do not become constitutional experts, they will be relying increasingly on the judicial process to solve

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EA 015 370

critical problems -- and the solutions are most likely to have serious effects on the goals and operations of public programs. This possibility inspires a critical question: Will attorneys and judges become gatekeepers to public policy? The answer may be ominous for those who believe that policy-making should take place with the broadest possible participation of elected officials and citizens.

The Direct and Indirect Costs of Litigation

There are also practical reasons for limiting the role of attorneys and judges: The legal process relies heavily on litigation. This process is extraordinarily expensive, time consuming and emotionally painful. Regardless of how a case ends, there are no real winners. Everyone must bear some of the heavy expenses in time and money. Frequently, even clear winners are emotionally exhausted. The positions of the parties harden and become inflexible.

The Limitations on Judicial Policymaking

Judicially-designed solutions are apt to be narrow in concept and design. For example, the primary judicial measure of racial equality in the public school has for decades been racially balanced pupil assignments, without regard to racially equal political power, buying power (into either better neighborhoods or private education), or any other ingredients that could possibly

facilitate racially equal family choice in education.

This is not to belittle the extraordinarily important role of the courts in such cases, but only to point out that courts perform at their best when resolving simple disputes -- disputes requiring a "yes" or "no" answer, rather than a detailed set of requirements for future action. Yet in Brown v. Board of Education although the Supreme Court initially sought to have the policymakers fashion an appropriate remedy, they failed. The courts had an obligation to step in and fashion the remedy. Although the question of right or wrong was relatively simple, the question of remedy was and remains extremely complicated. The political necessities of the day forced this kind of judicial intervention into the policy making process. Today, however, most public officials seem to endorse the rightness of equality, and it should therefore be possible to achieve remedies through the legislative process rather than the courts.

Which Attorneys Will Represent the Public Sector?

The final argument for preventive law is somewhat speculative: it may be that the future holds a potential for a decline in the quality of attorneys representing the public's interest. The legal profession is at a crossroads, with its directions unclear. There is a pending glut of attorneys, pouring out of law schools at a rate that has more than doubled in the last 15 years. According to a recent survey by the Association of American Law Schools, in 1964, there were 54,265 students in law

school; in 1970, 82,499; and by 1980, 125,000. A force of 305,000 attorneys in the entire nation in 1970 grew to 518,800 in 1980, and a population of 750,000 attorneys is projected for the end of the 1980's. Such enormous changes will inevitably change the legal profession.

According to simplistic economic analysis, the price of an attorney should go down, but in fact, at least for the elite among new law school graduates, it is going up. The big New York law firms are offering salaries in the range of $40,000 annually - the bottom of a steeply-climbing salary ladder. Despite the larger pool of new law graduates, these firms seem determined to hire only the top ranking students from the top ranking law schools - a group which by definition does not increase in size. In contrast, a state attorney general's office may offer only $17,000 or $18,000. Here the numbers of law graduates may act to depress the salary that need be offered.

If law graduates make purely economic decisions, the best and brightest will end up in private firms, representing the interests of big business. The interests of the government and the rest of the world will be defended by the rest of the legal profession. There will also be a large number of unemployed attorneys looking for business, and even attorneys from the bottom of their graduating classes can be very resourceful on this point. If purely economic decisions are made, things look bad. Big businesses will have the smartest attorneys and will be in the best position to use the legal system to advantage; unemployed attorneys will be looking for new ways to use their talents as

litigators.

Of course, no one ever makes a purely economic decision. Ideals, ethics and self-respect are extremely important factors. In the past a bright young graduate often chose public service for idealistic reasons, along with a hope for greater responsibility or more trial experience. But an individual's dedication to such goals must be strong indeed to offset the lure of high salaries in big firms. Further, this individual is not likely to take a position as a government lawyer. Indeed, where an individual is motivated by idealism, she is likely to seek work with a public interest or civil rights advocacy group. Like the individual motivated by money, the individual motivated by ideals, who usually sees herself as an advocate, often ends up suing the government. For the idealistic attorney, civil rights or other public interest litigation is even more rewarding than government service. Not only is there considerable responsibility and trial experience available right out of law school, but a tremendous sense of power. Judicial decisions can turn outrageously bad public policy around (for example, Brown v. Board of Education). These attorneys are undoubtedly trading high salary for high psychic rewards: for example, the power and satisfaction that can come from turning a public education system upside down.

Speaking as one who has been a government attorney, it appears that lawyering for the government rarely offers the same psychic rewards. The attorneys in government agencies do probably still enjoy more trial experience and responsibility, but those who seek these jobs for this reason usually plan on moving into

private practice later. In short, the government with its lower pay scales and lower "psychic" pay is able to attract the best and brightest from the recent crop of law graduates by offering more attractive prospects for trial experience and responsibility, and will probably lose these people in a few years, leaving the government with attorneys with much experience but not much imagination (or whatever it is that distinguishes high ranking law graduates from the others).

Why Preventive Law?

This brings us to the importance of preventive law for the public sector. The discussion thus far argues for development of policies and practices that will keep the public agency out of court: Litigation is expensive; it delays decisions; it drains the parties of emotional energy; it constricts policy choices; and the government's attorney may be outclassed by the attorney representing big business. The practice of preventive law clearly should be explored, and pursued vigorously where it promises to correct some of these conditions. Everyone has a role in this endeavor - the legal profession, the government policymaker, the universities and the courts. Each of these is likely to respond differently to the challenge.

Resistance to Preventive Law From Attorneys

Whether preventive law will be practiced depends in large part on the support of the legal profession. But attorneys might well resist the idea. First, it is against their economic interests. Attorneys receiving $50 to $200 per paid hour have no financial incentive to avoid prolonged litigation. Indeed, the trial attorney's greatest skills are often aimed at delay - at prolonging litigation. While I truly believe that the typical attorney sincerely believes whatever trial strategy is chosen is in the interest of his client, I cannot help but notice that much of it is also in the attorney's best economic interest.

Second, there is much about the mystique of lawyering that works against the preventive law ideal. Many law students and attorneys see themselves as valiant warriors. They live for the trial - their jousting ground. And one can gain a tremendous sense of power upon coming out victorious in such a battle. The media, both in news coverage and in programs for entertainment, further adds to this image of the attorney as a glamorous fighter in court. All this attention, along with the staggering impact of some cases, such as Brown v. Board of Education, make court room practice much more fun than quiet discussions with legislators at a point where policy is in an incipient stage. This is what lures some of the best and brightest attorneys into public interest and civil rights interests advocacy groups. I do not at this time applaud or criticize those who turn the public system upside down.

I only note that the practice of preventive law in some situations might achieve the same objectives, but leave greater flexibility for the policymaker. For attorneys trained as litigants, this is a less glamorous option. The bar, then, remains an unlikely agent for change in the structuring of the legal profession.

Resistance to Preventive Law From Judges

The bench could make a powerful contribution to the practice of preventive law. Were judges to become aware of the need of nonattorneys to understand basic principles of constitutional laws, opinions might become somewhat less obtuse. Also, courts might be slightly more willing to develop more straightforward analytical tools. Presently, for example, the United States Supreme Court applies three judicially developed tests -- all of which must be met -- to determine whether a law is constitutional under the first amendment's prohibition against establishment of religion. A law must have a secular intent, a primary secular effect, and must avoid excessive church state entanglement, so the "test" goes. Under the corresponding prohibition against inhibiting the free exercise of religion, and the prohibition against abridging the freedom of speech or press, the Court seems to examine only intent. In examining the equal protection clause of the fourteenth amendment, the Court has made it very clear that unlawful intent is necessary, while the effect of the law may constitute circumstantial evidence of intent. At no time has the Court clearly explained the need for different treatment of intent

in the various clauses of the first and fourteenth amendments. Nor has it explained why effect is treated differently under these clauses.

To add to this set of divergent rules, the Court has developed a theory of justification, with varying levels of justification, which will permit some laws to stand even if the intent was within the constitutional prohibition. Justification analysis takes place typically when examining free speech and press issues, and equal protection issues. The Court has not taken a similar tack when examining establishment clause issues. Again, there is no clear judicial explanation for why this is so.

These diverse rules do not make it easy for attorneys, let alone nonattorneys to master the rules that would permit them to predict the next case. Yet prediction of the outcome of future cases is essential to the practice of preventive law. For good reason, courts prefer to rule in each case on narrow grounds. To do otherwise extends the court too far into the policy making arena, a result generally agreed to be undesirable. But it would be appropriate for a court to seek to develop and explain its decision-making processes in a particular case with the goal of making this process as clear as possible to the widest range of individuals. Courts may prefer not to do this because there is a certain security in shrouding the decision-making process in semi-mystery. One judge, when asked by a friend to explain why courts did not use a simple balancing test in equal protection cases explained, with unusual candor, that such a simple test would make it too easy for his associates at the country club to

argue with him over a final decision. Indeed, these complex judicial tests do assure judges that few people will criticize what the courts do, and it preserves the magnificent isolation of judges. Courts, then, seem unlikely to move too quickly in this direction.

The Role of the Policy Maker

This leaves one final primary agent for change - the policy makers themselves. If this group pursued preventive law goals, it would undoubtedly spur attorneys and academics, if not judges, to action.

Some of those who have thought about preventive law argue that legislators and other top policy makers care little about the constitutionality of their policies. These skeptics believe legislators make decisions based upon political expediency, content to let the courts correct their mistakes. The recent Massachusetts prayer law provides an example. It seems that most of the legislators as well as the Governor should have known that the law was unconstitutional. The cost to the taxpayer of the litigation in the inevitable lawsuit was not as exorbitant as it sometimes is, because of the relatively simple set of facts and the clear precedent requiring the courts to find the law unconstitutional as a law tending to establish religion. Yet the issues were simple enough that the most likely outcome should have been foreseen by the legislature. The final legislative decision suggests a lack of knowledge by the legislators of basic

principles of constitutional law, or in the alternative, a lack of appreciation for the good sense of their constituents. A clear and firm statement that a legislator believes a law to be unconstitutional should not discredit that legislator politically. I note only that when asked to vote on a referendum to require inclusion of bible reading in public schools in Clear Creek, Iowa (the heartland) the voters turned it down by a vote of 689 against; 90, for. I doubt very much that the citizens of Massachusetts are less sensitive than Iowans to the basic rights and principles of our system of government. What seems to be needed is a better awareness among legislators of the political viability of rejecting legislation because of severe constitutional infirmities. Although public opinion polls sometimes show a majority willing to abolish, for example, free speech, these polls are not taken after a thorough and impassioned public debate on specific issues.

A Role For Academics

Finally, a major difficulty with the practice of preventive law is that we know so little about it. It is not taught in law schools. Academic research does not focus on it. There are no studies, no lively discussions. I am a director of a center that seeks to practice preventive law in the public sector. Yet I am keenly aware that we operate largely on intuition. Specifically, we provide state education policy makers with information needed

to design policy that is less likely to provoke a lawsuit, and if challenged, less vulnerable to judicial revision. Because we know most litigation in our field revolves around constitutional issues, we try to be particularly sensitive to first amendment rights, and to the rights of certain "at risk" populations -- racial minorities, female students, the handicapped and students who are not proficient in English. Yet, I cannot say for sure why a legislator in one state will decide to call us for advice, while in another, a legislator will vote for a law blissfully ignoring its constitutional implications, and in a third state, a legislator will vote for a law on the basis of political expediency, knowing that the law is probably unconstitutional. While academic research has not focused on these questions to date, most academics are generally happy to discover a new subject where research promises to be relevant and useful.

Prognosis For Preventive Law

Thus, there is hope for preventive law. There are enough idealists in the legal profession to dedicate themselves to preventive law goals. An ancient legal tradition still holds that "the best attorney never goes to court." Academics are beginning to look at it as a phenomenon worth studying. When when the Education Commission of the States - a national organization formed by interstate compact and serving top state officials in both legislative and executive branches - decided to have a law center, it established one based upon preventive law goals.

Further, institutions such as the Spencer Foundation, the Carnegie Foundation and the Ford Foundation have been extremely supportive of this venture.

All this suggests that, despite the glut of lawyers entering the market, preventive law will become a conscious part of public policy making. For education, hopefully this in the long run will mean more public dollars for teachers and fewer for attorneys.

How to Practice Preventive Law

The task at hand for all the actors - judges, attorneys, public officials and academicians, is to learn how to put the idea to work. Based upon one attorney's limited experiences, I would stress legal education for public officials, especially a thorough background in constitutional principles. I base my conclusion partly on my years of teaching law to public administrators. Most students felt they had a better perspective on their jobs on completing the course and felt they could avoid obvious pitfalls leading to litigation. I, in turn, felt those students had an excellent grasp on constitutional law - better, in fact, than that of an attorney specializing in, say, divorce law.

An analogy to the practice of medicine is also useful. An enormous number of medical disasters take place because patients ignore important symptoms. Frequently, more detailed and careful instruction from a medical expert can avert disaster. But doctors are notorious for their failure to talk to the patient. They do not want to be teachers. Yet, the patient is usually in the best

position to monitor his or her own condition, and indeed is often the only person able to monitor it on a continuing basis. Likewise, an attorney is often tempted to prescribe a cure without explanation. Yet the public agency is forced to make decisions in a constantly changing political and legal environment, and neither client nor lawyer can exchange a continuous stream of information and advice. This strongly suggests that the lawyer who seeks to practice preventive law in the public sector cannot be an advocate, but must be a teacher - just as doctors must teach about medicine to the public.

This study of law by policy makers would be most profitable if concentrated on those legal issues that most profoundly affect public policy. In the field of education, most of the preventable litigation falls within the area of constitutional law. There is an additional, related area extending to statutory rights of students and teachers. This study includes, of course, adequate instruction on when to seek professional advice; the training of school officials in legal principles is an important supplement, not a substitute for attorney review. In short, legal training for education administrators seems imperative in today's political and legal climate.

Unfortunately, many schools of public administration and education administration do not offer law courses, or offer them only as electives; where offered, there is often an old-fashioned focus on torts and contracts -- areas of law with few significant policy implications. However, the study of the subject can be pursued through a careful reading program and selective attendance

at seminars and training sessions.

Above all, public officials do not have to go to law school. They don't have to write contracts. They don't even have to know what a common law tort is. (The common law of torts relies heavily on the standard of a reasonable person to determine liability and I believe most public officials are reasonable persons.) But, at least for education policy, they should know something about the bill of rights and civil rights legislation. These are carefully written statements of public policy ordering important aspects of their work. How these laws work together and how the courts interpret them should be their business.

In the long run, I believe this training would help to minimize litigation. I believe it would not only provide public officials with the knowledge needed to make decisions which are less likely to lead to litigation, but also to encourage them to become more sensitive to the rights of the people who will be affected. If this theory is correct, it would suggest a particular approach to the practice of preventive law for attorneys. It would suggest a required course in fundamental principles and constitutional law for those planning a career in public service. Perhaps most of all it would require a continuing program of study in constitutional principles for public policy makers.

In sum, last year's prescription from legal counsel is not necessarily valid today. The taxpayer cannot afford to keep attorneys looking over the public official's shoulder every minute. If these officials do not venture forth into this area,

the result is likely to be a telephone call to the lawyer after an unconstitutional or illegal decision is made, when it is too late to avoid litigation. The next step is judicial intervention, and ultimately court-mandated changes that will profoundly affect the program.

More importantly, if only lawyers and judges are trained to interpret the law and constitution, they become gatekeepers to decisions affecting public policy, and this seems unsafe for democracy. Knowledge of our most basic rights is too important to be left to one narrow segment of society. To best preserve our most fundamental constitutional rights, everyone must know what they are.

About the author

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